No. 78-100

In the Supreme Court of the United States

OCTOBER TERM, 1978

KENNETH C. FITZGIBBON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 576 F. 2d 279.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on May 9, 1978, and a petition for rehearing was denied on June 9, 1978. The petition for a writ of certiorari was filed on July 18, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was properly convicted under 18 U.S.C. 1001 for making a materially false statement in the

course of routine administrative processing through customs.

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of knowingly making a false statement in a material matter within the jurisdiction of an agency of the United States, in violation of 18 U.S.C. 1001.[1] He was sentenced to one year's imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that on March 31, 1977, petitioner, a United States citizen, arrived at the Denver airport on a flight from Canada (II R. 33-34). At the customs inspection area of the airport, posters advised incoming passengers of their duty to report any currency or negotiable instruments exceeding $5,000 in value (II R. 62). Petitioner handed Customs Inspector Lockhart his Customs Declaration Form 6059-B, on which petitioner had checked "no" in response to the question, "Are you or anyone in your party carrying over $5,000 in coin, currency, or monetary instruments?" (II R. 35-36; Gov't Exh. 1). Lockhart then followed routine administrative procedure by orally repeating that same question, and petitioner again made a negative response (II R. 36-37). Petitioner explained that he had only been in Canada overnight and had acquired nothing on his trip (II R. 37).

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[1]18 U.S.C. 1001 provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Noticing that petitioner was hesitant in his answer and appeared to be nervous, Lockhart decided to conduct a secondary examination in a separate room (II R. 38-39, 48). At Lockhart's request, petitioner emptied his pockets, which contained a relatively small amount of Mexican and Canadian currency (II R. 42). Petitioner then stated that he had no more money in his possession (II R. 43). Lockhart asked petitioner to remove his boots, and petitioner said either "You found my investment," or "There goes my investment" (II R. 43-44). Petitioner then produced two large bundles of Canadian currency from inside his boots (II R. 44-45). The value of this currency was slightly in excess of $10,000 in United States money (II R. 101).

After receiving *Miranda* warnings, petitioner told Customs Agent King that he had acquired the money in Canada, and that "he didn't want to have a hassle with the United States Internal Revenue Service for the reason that a portion of the money was not his, that he was to forward it to an individual in New Jersey" (II R. 55).

ARGUMENT

Petitioner contends (Pet. 5-9) that the false statements he made during routine customs processing into the United States fall within the "exculpatory 'no' " exception to 18 U.S.C. 1001 recognized by some courts. However, petitioner failed to raise this contention in the district court or in his brief and petition for rehearing in the court of appeals.[2] Since no exceptional circumstances justify

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[2]Although petitioner asserts (Pet. 4) that he "touched on" this argument in his opening brief in the court of appeals, the only reference to the "exculpatory 'no' " doctrine in that brief appears in a

raising the claim for the first time here, this Court should decline review. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n. 7; *Lawn* v. *United States*, 355 U.S. 339, 362-363 n. 16.

In any event, petitioner's contention is without merit. 18 U.S.C. 1001 had its origin in a statute enacted in 1863 "in the wake of a spate of frauds upon the Government." *United States* v. *Bramblett*, 348 U.S. 503, 504. The original statutory provision prohibited only those false claims that were intended to defraud the government of property. In 1934, however, the statute was broadened to embrace false and fraudulent statements regardless of whether any pecuniary loss to the government was involved. "The amendment indicated the congressional intent to protect the authorized functions of governmental departments and agencies from the perversion which might result from the deceptive practices described." *United States* v. *Gilliland*, 312 U.S. 86, 93.[3]

quotation from *United States* v. *Beer*, 518 F. 2d 168, 171 (C.A. 5), cited as support for the proposition that materiality is an element of the crime under Section 1001 (Appellant's Br. 21). Petitioner did not then suggest that his response on the customs form was outside the purview of the statute by virtue of the "exculpatory 'no' " doctrine. It was only after the court of appeals denied his petition for rehearing on June 9, 1978, that petitioner raised this claim for the first time on June 25, 1978, in an untimely petition to recall the mandate and for rehearing *en banc*. See Fed. R. App. P. 35(c), 40, 41(a). In these circumstances, to consider petitioner's claim to have been properly raised below "would tend to encourage piecemeal litigation of claims of error in the appellate courts and undercut the policy of achieving prompt and final judgments." *United States* v. *Scallion*, 548 F. 2d 1168, 1174 (C.A. 5), certiorari denied, June 5, 1978, No. 76-6559.

[3]The 1948 revision of the Criminal Code merely put the statute in its present form without working any substantive change in its scope. See *United States* v. *Bramblett*, *supra*, 348 U.S. at 508.

Although the literal reach of the statute is quite broad, several courts have held, as a matter of statutory construction, that Section 1001 is inapplicable where a suspected criminal merely gives a false, but exculpatory, negative response (an "exculpatory 'no' ") to incriminatory inquiries of government agents acting in an investigative capacity. See, *e.g.*, *United States* v. *Krause*, 507 F. 2d 113, 117 (C.A. 5); *United States* v. *Bush*, 503 F. 2d 813, 815 (C.A. 5); *United States* v. *Lambert*, 501 F. 2d 943, 946 (C.A. 5) (*en banc*); *Paternostro* v. *United States*, 311 F. 2d 298 (C.A. 5). Since the Fifth Amendment would prohibit the government from punishing a defendant for his mere refusal to make a self-incriminating statement in response to an investigative inquiry, the courts have been reluctant to assume that Congress meant to punish the defendant who has answered the question with a false exculpatory denial instead of silence. The "exculpatory 'no' " exception to Section 1001 is thus designed to protect the constitutional privilege against self-incrimination by limiting the potential for abuse that might arise if the false statement offense were used against the targets of criminal investigations. See, *e.g.*, *United States* v. *Bush*, *supra*, 503 F. 2d at 815; *United States* v. *Lambert*, *supra*, 501 F. 2d at 946 n. 4. See also *United States* v. *Chevoor*, 526 F. 2d 178, 183 (C.A. 1), certiorari denied, 425 U.S. 935.

In determining the contours of an "exculpatory 'no' " exception to the false statement offense, the courts have maintained a distinction between lies uttered in response to "administrative" inquiries and those proferred in an "investigatory" context. Since the "exculpatory 'no' " doctrine is thought to be justified by the need to avoid the "powerful impetus to inquisition as a method of criminal investigation" that 18 U.S.C. 1001 might otherwise supply, *United States* v. *Bush*, *supra*, 503 F. 2d at 815, the doctrine has been applied to investigative

inquiries or "to statements made to government agents acting in a purely 'police' capacity." *Ibid.* See also *United States* v. *Krause, supra,* 507 F. 2d at 117; *Paternostro* v. *United States, supra,* 311 F. 2d at 309.[4] Where the government employee is not investigating suspected criminal activity but is instead acting merely in an administrative capacity, however, the concern over inquisitorial procedures is not present. If the defendant has sought to obtain administrative approval for action involving governmental functions, his uttering of a false statement in response to routine administrative questioning is "far removed from the basic situation" in which the "exculpatory 'no' " doctrine would properly apply. *United States,* v. *Bush, supra,* 503 F. 2d at 818 n. 2.

The facts in this case do not present a situation in which the government has attempted to use 18 U.S.C. 1001 "to compel citizens to answer truthfully every question put to them in the course of a federal police or federal criminal investigation." *Id.* at 815. Instead, the petitioner was merely asked a standard question on a form

[4]In the brief filed by the United States in *Nunley* v. *United States,* 434 U.S. 962 (which we are sending to petitioner), we noted our agreement with the decisions of the courts of appeals that apply the "exculpatory 'no' " doctrine in the narrow context of false denials of guilt made by targets of criminal investigations. We stated there (p. 8) that the Department of Justice has adopted a policy requiring the approval of the appropriate Assistant Attorney General before any prosecution may be brought under 18 U.S.C. 1001 for false statements made to a federal investigator. In implementation of that policy, the Department ordinarily refuses permission to prosecute where the false statement is made during the context of a criminal investigation and essentially constitutes merely a denial of guilt. In adopting this policy, however, the United States does not acquiesce to extensions of the "exculpatory 'no' " doctrine into administrative contexts, or where the statement is an elaborate effort to mislead investigators, or where, as here, a truthful answer is not incriminating.

that is given to virtually all travelers upon entry to this country as part of routine administrative processing. The undisputed evidence reveals that at the time petitioner falsely completed the customs form, and orally affirmed his false response to the customs inspector, petitioner was not the subject of a criminal investigation.[5] Petitioner was seeking a necessary administrative approval for his entry into the country, and his false statements were designed for the purpose of concealing information that was relevant to that administrative process. The false statements made by petitioner in this case thus were not made in the investigatory context to which the "exculpatory 'no' " doctrine properly applies. See *United States* v. *Rose,* 570 F. 2d 1358, 1363-1364 (C.A. 9).

Perhaps more fundamentally, however, the question asked on the customs declaration form, and by the customs inspector, was not itself an incriminating one. It is not a crime to transport more than $5,000 into the United States; it is only a crime willfully to refuse to report that currency in excess of that value is being imported, 31 U.S.C. 1058, 1101(a). A truthful answer to the administrative inquiry would thus not have been incriminating—indeed, it would have been exculpatory since it would have led to compliance with the reporting requirement. The "exculpatory 'no' " doctrine accordingly has no application in a case such as this.

Nor was the government required to inform petitioner that he would not incriminate himself by telling the truth. See *United States* v. *Gomez Londono,* 553 F. 2d 805, 811

[5]Although petitioner had come under suspicion as a result of a tip, customs inspector Lockhart, who processed petitioner, did not recognize petitioner by name or description (Pet. App. ii).

(C.A. 2). The purpose of the "exculpatory 'no' " doctrine has never been to protect persons who lie to federal officers merely because they mistakenly believe it advantageous to do so. "Our legal system provides methods for challenging the Government's right to ask questions—lying is not one of them." *Bryson* v. *United States*, 396 U.S. 64, 72 (footnote omitted). See also *United States* v. *Wong*, 431 U.S. 174, 180.

Petitioner's assertion (Pet. 5-7) that the decision in this case conflicts with the Fifth Circuit's decision in *United States* v. *Schnaiderman*, 568 F. 2d 1208, is not well taken. In *Schnaiderman*, the defendant was prosecuted under 18 U.S.C. 1001 for falsely stating, in response to a customs inspector's question, that he was carrying less than $5,000. The court held that the "exculpatory 'no' " exception was applicable to the defendant's oral denial of the customs inspector's question. 568 F. 2d at 1212-1213. The court suggested, however, that it might have reached a different result if the defendant had been prosecuted for a false *written* statement on the customs declaration form. *Id.* at 1210 n. 4. In addition, the court emphasized that there was "no evidence" in that case that the defendant had knowledge of the reporting requirements of 31 U.S.C. 1058 and 1101 or that the defendant had "a knowing and willful intent to pervert the purpose of the Bank Secrecy Act." *Id.* at 1213.

Here, unlike the situation in *Schnaiderman*, petitioner's conviction under 18 U.S.C. 1001 is based in part upon his written response on the standard customs declaration form, which he tendered to the inspector. Moreover, in contrast to *Schnaiderman*, the court of appeals determined here that petitioner had knowledge of the reporting requirements (Pet. App. ix):

> He made a statement from which it could reasonably be inferred he knew of the requirement when he said he wanted to avoid a hassle with the United States Internal Revenue Service. Further, the fact he carried the money in his boots rather than in his wallet or in his pockets supports the inference he was attempting to hide it. His possession of a false driver's license, and his "no" answers to repeated questions about whether he acquired anything in Canada and whether he had money would support the conclusion he knew of the reporting requirement.

Beyond that, since petitioner did not raise his contentions concerning the "exculpatory 'no' " doctrine in the court of appeals (see p. 3 and n. 1, *supra*), that court has not addressed the issue. Thus it cannot be said that the decision below stands in conflict with *Schnaiderman*.[6]

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[6]We note, in addition, that petitioner's reliance (Pet. 5-7) on *United States* v. *Granda*, 565 F. 2d 922 (C.A. 5), and *United States* v. *San Juan*, 545 F. 2d 314 (C.A. 2), is misplaced. Neither *Granda* nor *San Juan* involved application of the "exculpatory 'no' " doctrine to a prosecution under 18 U.S.C. 1001. Rather, those cases involved convictions for violations of the reporting requirements of 31 U.S.C. 1101 and 1058. The courts held in those cases that there was insufficient evidence of the defendants' knowledge of the reporting requirements and of their specific intent to commit the offense. Here, on the other hand, petitioner has been convicted for making a false statement, not for failure to report, and here the court below has found sufficient evidence of petitioner's knowledge of the reporting requirements to support his conviction under Section 1001.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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